STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRAMAPAC DELICATESSEN, INC.	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1983 through August 31, 1986.	:	

Petitioner, Framapac Delicatessen, Inc., 101 West 57th Street, New York, New York 10019, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through August 31, 1986 (File No. 806672).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 3, 1990, at 1:15 P.M. Petitioner appeared by Stewart Buxbaum, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether a statement under Tax Law § 1138(c) consenting to the fixing of tax due (Form AU-3) was valid when the Division of Taxation now asserts it does not approve of that consent and the limitation period under Tax Law § 1139(c) is in dispute.

II. Whether the two-year period for a claim for refund under Tax Law § 1139(c) commences with each partial payment of the tax fixed to be due under Tax Law § 1138(c) or whether it commences, as petitioner asserts, only with the final payment of the full amount fixed to be due.

III. Whether petitioner may amend its petition to contest an entire notice of determination when the petition filed had stated only that penalty and interest were being contested.

IV. Whether a notice of determination of tax due can be repudiated by the Division of Taxation as not authorized because of a previously filed valid statement by the taxpayer

consenting to the fixing of tax due (without the need of a notice of determination).

FINDINGS OF FACT

A sales tax audit of petitioner, Framapac Delicatessen, Inc., was conducted for the three-year period September 1, 1983 through August 31, 1986.

(a) On February 11, 1988, a "Statement of Proposed Audit Adjustment" (Form AU-3; see Tax Law § 1138[c]) was signed by petitioner. The statement, which had been prepared by the Division of Taxation, gave a summary of sales and use tax due of $113,573.91, plus penalty under Tax Law § 1145 of $30,311.92 and interest of $45,298.15, for a total amount due of $189,183.98. (A printed instruction said that "appropriate penalty and/or interest" would run until payment was made.) Petitioner wrote thereon that it agreed to the sales tax of $113,573.91 and minimum interest of $28,110.62 but not to the excess interest of $17,187.53 nor the penalty of $30,311.92. The instructions on the form ask for its return within 30 days to the Division with either agreement or a statement of disagreement. It states that failure to either agree or disagree will result in the issuance of a notice of determination. The taxpayer may consider the matter approved if he is not notified to the contrary within 60 days. The instructions state further that the Tax Law provides for the filing of a signed consent; that "such consent, subject to review and approval" waives the 90-day period for fixing tax, but does not waive a right to apply for a refund; and that the "agreement to and signing of this statement constitutes such a consent". In this case, the consent would have been considered approved as of April 12, 1988.

(b) On the same date, February 11, 1988, petitioner paid the determination in the amount of $113,573.91. This was endorsed on the determination issued on that date as "for sales tax only."

(c) On the same date, February 11, 1988, a notice of determination was issued for sales and use taxes due for the period September 1, 1983 to August 31, 1986 in the amount of $113,573.91, plus penalty under Tax Law § 1145 of $30,311.92 and interest of $45,298.15, for a total amount due of $189,183.98. This notice contained the typed-in message that: "This tax is being assessed in accordance with the signed Statement of Proposed Audit Adjustment." It

also contained the printed statement that it shall be final "unless an application for a hearing is filed with the State Tax Commission within 90 days from the date of this notice...." This notice, by its terms, became final on the 90th day, May 12, 1988.

(d) No document finally and irrevocably fixing the tax pursuant to Tax Law § 1138(c), other than the Statement of Proposed Audit Adjustment or the notice of determination, if either qualifies as such a document, was transmitted to petitioner.

(a) A request was made dated February 24, 1988, for a conciliation conference with respect to the February 11, 1988 notice of determination. This request specified an objection to penalties and excess interest and requested abatement on the grounds that petitioner's records were in good order and petitioner was cooperative in the audit.

(b) A conciliation order dated December 23, 1988, denied any relief and sustained the statutory notice.

(a) A petition dated February 21, 1989 for revision of the determination was filed with the Division of Tax Appeals and was received on March 6, 1989. (This has been conceded to be a timely petition, undoubtedly because the limitation period was suspended for ten months under Tax Law § 170[3-a][b] awaiting the conciliation order.) The petition stated that it contested the penalty and excess interest. Petitioner at this time (and prior thereto) was represented by Sidney H. Fields, C.P.A.

(b) The answer of the Division of Taxation to the petition was dated and mailed on July 24, 1989. It stated the penalty was asserted "by reason of underreporting and/or payment" and requested that the penalty be sustained.

(a) Petitioner filed a new petition dated March 19, 1990, and received March 26, 1990, stated to be an amendment to the original petition. Petitioner at that time was, and still is, represented by Stewart Buxbaum, C.P.A. This petition was directed at the February 11, 1988 notice of determination and requested a revision of that determination. The petition asserted that full records existed which the auditor ignored, reasonable cause existed for the elimination of penalties and that the Division misled petitioner when it obtained any signed agreements.

(b) No answer was made by the Division of Taxation to this petition.

(a) On September 26, 1990, petitioner paid $35,645.34. This was credited to interest due on the February 11, 1988 determination from February 11, 1988 through September 30, 1990.

(b) An application for credit or refund dated October 2, 1990 was filed, seeking a refund of the sales tax of $113,573.91 paid on February 11, 1988 and interest of $35,645.34 paid on September 26, 1990.

(c) This claim for refund was rejected by letter dated October 15, 1990. The letter of rejection stated that the Statement of Proposed Audit Adjustment, Form AU-3, was "invalidated" because it had been "altered" by the taxpayer. (This altering referred to is the statement of the taxpayer as to the amount of tax to which it would agree.) The rejection letter states further that the notice of determination (AU-16) had been properly issued and timely petitioned.

(d) A petition dated October 26, 1990 was filed for a refund, stating, in effect, that the "tax determined" and the "amount of tax contested" were each $113,573.91.

(e) An answer was made, dated and mailed November 5, 1990. This characterized the petition as a "supplemental petition", asserted the propriety of the original audit and asserted that the claim for refund of the amount of tax paid on February 11, 1988 was more than two years after such payment, and therefore was invalid under Tax Law § 1139(c). It further claimed that the interest in issue is minimum interest on the tax where the tax itself is no longer subject to review because of the limitations period.

(f) The Division of Taxation has moved (as part of its November 5 answer) that the petition for refund be dismissed on the grounds that there is no jurisdiction over the subject matter of the petition (see 20 NYCRR 3000.5[b][ii]).

SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation, on its motion to dismiss the petition for refund, argues that the application for refund was not filed within three years of the time the tax involved was

payable, as allowed by Tax Law § 1139(a), or, as petitioner concedes, (entirely) within two years from the time of payment, as allowed by Tax Law § 1139(c), and that, in any event, the two-year period of Tax Law § 1139(c) is inapplicable since that provision requires that the taxpayer have filed a statement under Tax Law § 1138(c) consenting to the fixing of the tax and the statement filed by the taxpayer was invalid and not approved by the Division of Taxation. The Division further argues that the earlier petition for the revision of a determination is invalid because the issuance of that notice was unauthorized when, as it asserts occurred here, the taxpayer had filed a valid statement under Tax Law § 1138(c) consenting to the fixing of the tax.

Petitioner argues that the statement consenting to the fixing of the tax under Tax Law § 1138(c) was valid whether or not the Division agreed to it and that it paid the final installment of the tax so fixed within two years of the filing of its application for refund. Petitioner further argues that its petition for revision of a determination is valid since the petition was filed in accordance with the notice of determination issued by the Division of Taxation and that it can amend the petition, if any amendment is necessary, to include the amounts in dispute in its refund claim.

CONCLUSIONS OF LAW

A. The motion by the Division of Taxation directed at the petition for refund and stating that the Division of Tax Appeals has no jurisdiction over the subject matter (see 20 NYCRR 3000.5[b][ii]) must be denied. The Division argues that the petition for refund is not permissible because the prior application for refund made on October 2, 1990 was not timely made. Such an application must be made within three years of the time that the tax in question would have been payable (Tax Law § 1139[a]). Here, the application for refund was made on October 2, 1990, well after the three-year period for taxes due in the period September 1, 1983 through August 31, 1986. Thus there is no question then that under Tax Law § 1139(a) the refund application was untimely. Petitioner does not contest that. However, the Division further argues that an alternate time limitation allowing a refund within two years of the time

the tax was paid (Tax Law § 1139[c]) would not be applicable either because that applies only when there has been filed with the Commissioner of Taxation and Finance, under Tax Law § 1138(c), a signed statement in writing consenting to the fixing of the tax. While there was such a writing, the Division argues that it has a right to reject the request for fixing the tax and it notified petitioner on October 15, 1990 (2½ years after the request) it was doing so. I hold that the Form AU-3, "Statement of Proposed Audit Adjustment", constituted a valid statement under Tax Law § 1138(c) consenting to the fixing of the tax due. The instructions on the Form AU-3 state explicitly that the agreement and signing by the taxpayer constitutes a consent to fix the tax. The attempt to condition the taxpayer's consent to a fixing of the tax on an "approval" of the amount of tax due or upon any subsequent review by the Division is not justified by the statute. This attempt merely confuses the statement of the taxpayer consenting to the fixing of a tax, under Tax Law § 1138(c), with an agreement to the amount of the tax which would be authorized under Tax Law § 171(18). The statement of consent under Tax Law § 1138(c) needs no agreement on the amount of tax due -- in fact, it explicitly leaves the taxpayer with the option of filing a petition for a refund. The fixing of the tax in accordance with the consent was done in this case in either of two ways. The "Summary of Sales and Use Taxes Due" on the Form AU-3, signed on February 11, 1988, may be taken as a fixing of the tax subject to the condition, stated on the form, that it is final only if the taxpayer does not hear to the contrary within 60 days, at least where within such time no alternative computation is submitted to the taxpayer, and none was in this case. Alternatively, in this case, a fixing of the tax occurred with the issuance of the notice of determination immediately on February 11, 1988. That notice contains figures identical to those on the Form AU-3 and refers explicitly to the "Statement of Proposed Audit Adjustment" (Form AU-3) and certainly could be construed by the taxpayer as an answer to its request to fix the tax. Once there has been a fixing of the tax under Tax Law § 1138(c) then the time to request a refund would run from "the date of payment of the amount assessed in accordance with the consent filed..." under Tax Law § 1139(c). In this case, the payment of the amount assessed in accordance with the consent was made on two dates,

February 11, 1988 ($113,573.91) and on September 26, 1990 ($35,645.34). Where there is more than one payment, the Tax Appeals Tribunal has read the statute very literally and ruled the refund time runs from the date of the last payment. The Tribunal has stated, in a case where the taxpayer had already made one payment:

> "When payment has been made in full, petitioner will have two years from the date of the final payment to file a claim for a refund for the entire amount assessed in accordance with the consents." (In the Matter of the Petition of Sak Smoke Shop, Inc., Tax Appeals Tribunal, January 6, 1989.)

In the instant case, the refund application of October 2, 1990 was within two years of the final payment of September 26, 1990 and so is timely. I note the argument of the Division of Taxation that the basic tax due was completely paid in the earlier of the two payments and, therefore, should not be associated with the second payment (constituting interest) so as to come within the two-year limitation period. The answer to this argument is simply that the statute itself refers to the "amount assessed" in the singular and without differentiation between basic tax and interest.

B. However, even if the petition for refund in this case cannot be heard, there still exists a petition for revision of a determination which, I hold, can itself still be heard. That petition filed on March 6, 1989 protested, pursuant to Tax Law § 2008, the February 11, 1988 notice of determination (and there is no issue raised as to its timeliness). That petition can now be amended under the rules of the Division of Tax Appeals (20 NYCRR 3000.4[c]). The amendment proposed here to add a protest against the basic tax due as well as the interest on the basic tax would not affect any taxable periods not already in issue under the original petition and, therefore, would involve the same "cause of action" (see, Commissioner v. Sunnan, 333 US 591, 598) and would not be barred by the time limitations of the Tax Law (Miami Valley Coated Paper Co. v. Commissioner, 211 F2d 422, 54-1 USTC ¶ 9327; see, Braude v. Commissioner, 808 F2d 1037). Where, as here, the amended petition would involve the same tax periods as does the original petition, the allowance of the amendment must rest on pragmatic factors such as prejudice to the opponent, bad faith, dilatory tactics, the burden on the court, etc. (see, Brewer v. Commissioner, 58 TCM 493). In this State, only the most

extraordinary circumstances should bar an amendment in a tax case. In New York, the tradition in administrative hearings is to provide remedies with as few legalistic impediments as possible, there are no statutory requirements that a petitioner detail its claims and in practice in tax cases most petitions do not do so and the answers filed to the petition are themselves uninformative. Petitioner has already filed an amended petition received on March 26, 1990 attempting to do this, though it did not then have the consent of the supervising administrative law judge or of the administrative law judge assigned to the matter (myself) as the regulation requires. I can see no prejudice to the Division of Taxation in granting the opportunity for the amendment as already made and I so grant it.

C. The Division has, at the hearing of this case, opposed any consideration of the petition protesting the notice of determination on the grounds that that notice of determination is not valid (or at least it is not valid as to the basic tax and simple interest assuming it might be "partly" valid as to penalty and interest). The Division now states (contrary to the position expressed in the denial of the refund claim and in the opposition to the petition for refund) that the AU-3, "Statement of Proposed Audit Adjustment", was, in fact, valid and no notice of determination under Tax Law § 1138 was needed. Collection could have been made simply by notice and demand and warrant under Tax Law § 1141. The notice of determination was therefore unauthorized. I hold that even if it was true that the notice of determination was unauthorized, the Division is now estopped to assert the invalidity of its official form where it would be to the taxpayer's detriment. The Federal courts have so held in similar cases. In one Federal case, the taxpayer had signed a Form 2297 waiving any formal notice of disallowance of a claim for refund (see IRC § 6532[a][3]), but later on, mistakenly, a formal notice of disallowance was sent to the taxpayer. The court held that the limitation period commenced on the date of the formal notice and the Treasury could not repudiate that notice in order to commence the limitation period on the date of the waiver (Miller v. United States, 500 F2d 1007; see also, Exchange and Savings Bank of Berlin v. United States, 226 F Supp 56). In New York, the result should be the same. In cases where the limitation period is in issue, the

government has been estopped even where the misleading information has not been in writing (People v. Thomas, 47 NY2d 573; Allen v. Board of Assessors of the Town of Mendon, 57 AD2d 1036; Buffalo Hebrew Christian Mission, Inc. v. City of Syracuse, 33 AD2d 152; see also, Matter of Eastern Tier Carrier Corporation, Tax Appeals Tribunal, December 6, 1990).

D. The motion to dismiss the petition for refund is denied. The petition to review a determination may be amended, and a hearing on the merits of the claim will be scheduled on the next available calendar.

DATED: Troy, New York
2/22/91

ADMINISTRATIVE LAW JUDGE